WHITE MOUNTAIN APACHE TRIBE
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-67-A Decided January 9, 1992

Appeal from disapproval of a tribal bingo/gaming ordinance.

Affirmed.

1. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The Bureau of Indian Affairs properly disapproves a tribal ordinance found to be in conflict with Federal law.

APPEARANCES: Robert C. Brauchli, Esq., Whiteriver, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant White Mountain Apache Tribe seeks review of a February 12, 1991, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving White Mountain Apache Ordinance No. 164, entitled "Bingo/Gaming ordinance." For the reasons discussed below, the Board affirms the Area Director's decision.

Background

On December 6, 1990, appellant's Tribal Council enacted Ordinance No. 164 "to govern and regulate the operation, conduct and playing of games of bingo and gaming on the Fort Apache Indian Reservation." By letter of December 12, 1990, the Superintendent, Fort Apache Agency, BIA, expressed several concerns with the ordinance. 1/ Appellant's

1/ Although the record does not include a formal request from appellant for review and approval of the ordinance, it is clear that appellant considered the ordinance subject to review. The ordinance itself contains a space for approval by the Superintendent. Further, the Superintendent's Dec. 12 letter states: "We have been requested by your Legal Department to expedite our review of the Bingo/Gaming ordinance. We therefore submit our comments although we have not officially received the ordinance and its authorizing tribal council resolution."

attorney responded to the Superintendent's letter and, on January 2, 1991, the Superintendent referred the matter to the Area Director.

On February 12, 1991, the Area Director disapproved appellant's ordinance, stating that his principal objection was to the ordinance's definition of "bingo game," which included forms of gaming specifically excluded from "class III" gaming under IGRA. 2/ The Area Director also indicated that appellant had proposed to install electronic bingo games. 3/

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fn. 1 (continued)

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1988), requires that certain tribal gaming ordinances be approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. § 2710(b), (d) (1988). The act also provides, however, that "the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations." 25 U.S.C. § 2709 (1988). The Commission has not yet promulgated any regulations governing review of tribal gaming ordinances.

All further references to the United States Code are to the 1988 edition.

2/ 25 U.S.C. § 2703 provides in relevant part:

"(6) The term 'class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

"(7)(A) The term 'class II gaming'means--

"(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

"(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

"(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

"(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

"including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo * * *

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"(B) The term 'class II gaming'does not include--

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"(ii) electronic or electromechanical facsimiles of any games of chance or slot machines of any kind.

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"(8) The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming."

Under 25 U.S.C. § 2710(d), class II gaming must, inter alia, be conducted in conformance with a Tribal-State compact.

3/ It is not clear whether appellant had submitted the proposal to BIA. No copy of any such proposal is included in the record.

Appellant's notice of appeal, including a statement of reasons, was received by the Board on March 21, 1991. No other briefs or statements were filed.

Discussion and Conclusions

Section 6.A of Ordinance No. 164 authorizes appellant to conduct tribal bingo games within the Fort Apache Indian Reservation. Section 4.A defines "bingo game" as

> the activity commonly known as "bingo" or "lotto" and which is played for prizes including monetary prizes, with cards or paper sheets bearing numbers or other designations as objects similarly numbered or designated, are drawn or electronically determined from a receptacle and the game being won by the person first covering a previously designated arrangement of numbers or designations on such card, and shall include pull-tabs, punch boards, and other games similar to bingo, including video bingo, video keno and electronic or electromechanical facsimiles of any game of change or slot machines of any kind authorized by Section 11(d) (3) of Public Law 100-497, the Indian Gaming Regulatory Act of 1988. [4/]

It is clear that this definition includes forms of gaming which fall within the category of class III gaming under IGRA. See footnote 2, supra.

Appellant acknowledges that it has not yet negotiated a Tribal-State compact for the conduct of class III gaming. It contends, however, that it may enact an ordinance authorizing class III gaming prior to negotiation of such a compact. "If a Tribe commences Class III gaming prior to obtaining a Tribal-State compact," appellant contends, "then that is a matter of enforcement by the Indian Gaming Commission or the state, not the Bureau of Indian Affairs, and cannot be the basis for disapproving the ordinance" (Appellant's Statement of Reasons at 4-5). Appellant further contends that "BIA is not authorized to make determinations regarding Indian gaming activities." Id. at 5.

[1] It appears to be appellant's view that BIA has no authority to disapprove appellant's ordinance based upon a BIA determination that the ordinance is in conflict with IGRA. The Board disagrees. In reviewing tribal ordinances, BIA has authority to determine whether the activity authorized by the ordinance conforms with Federal law. Cf. Moapa Band of Paiute Indians v. U.S. Department of the Interior, 747 F.2d 563 (9th Cir. 1984).

As to whether an ordinance authorizing class III gaming may be enacted or approved prior to negotiation of a Tribal-State compact, the United

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4/ Section 11(d)(3) of IGRA, 25 U.S.C. § 2710(d)(3), concerns the negotiation of Tribal-State compacts for the conduct of class III gaming activities.

States Court of Appeals for the Second Circuit has noted that 25 U.S.C. § 2710(d)(2)(C) "suggest[s] consummation of the compact will precede enactment of the tribal ordinance." (Emphasis in original.) Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1028 (2d Cir. 1990), cert. denied, ___ U.S.___ , 111 S. Ct. 1620 (1991). It would appear that an ordinance enacted prior to negotiation of a compact should, at the least, provide that it (or the portions of it authorizing class III gaming) will not go into effect until after the compact is approved.

As presently drafted, appellant's ordinance purports to authorize immediate institution of class III gaming. The Board finds that the Area Director properly disapproved it.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Phoenix Area Director's February 12, 1991, decision is affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge